NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: Byron Shire Council v Vaughan & Anor [No. 3] [2001] NSWLEC 102

PARTIES:
APPLICANT:
Byron Shire Council

RESPONDENTS:
John Bernard Vaughan and Anne Vaughan

CASE NUMBER: 30164 of 1997

CATCH WORDS: Estoppel

LEGISLATION CITED:
Encroachment of Buildings Act 1922 s 2, s 14
Land and Environment Court Act 1979 s 22, s 69

CORAM: Lloyd J

DATES OF HEARING: 21/03/2001

DECISION DATE: 30/05/2001

LEGAL REPRESENTATIVES

APPLICANT:
Mr J L B Allsop SC
and Ms L M Byrne (Barrister)
SOLICITORS:
Elliot & Sochacki

RESPONDENTS:
Mr S D Rares SC
and Ms R Sofroniou (Barrister)
SOLICITORS:
Walters

JUDGMENT:

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IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

Matters No: 30164 of 1997
Coram: Lloyd J
Decision date: 30 May 2001

Byron Shire Council

Applicant

v

John Bernard Vaughan and Anne Vaughan

Respondents

REASONS FOR JUDGMENT [No. 3]

1. This matter has had a long history, which is set out in my judgment of 20 October 2000 (*Byron Shire Council v Vaughan [No. 2]* (2000) 110 LGERA 425 at 426-427). Shortly stated, the applicant brought a claim for relief under the Encroachment of Buildings Act 1922 ("the Act") in relation to a building constructed partly on land owned by the applicant (lot 6 in deposited plan 1623) and partly on land owned by the respondents (lot 5 in deposited plan 1623).

2. In my judgment of 20 October 2000 I found that the respondents had established the defence of estoppel. That is to say, the applicant is estopped from asserting that the building is an encroachment (as defined in section 2 of the Act) and that the applicant is an adjacent owner (as defined in section 2 of the Act).

3. It follows that the council is not entitled to any relief on its application under the Act. The estoppel operates to defeat the applicant's claim to be an adjacent owner and its claim that there is an encroachment.

4. The respondents have, since the commencement of the proceedings, sought only an order that the application be dismissed.

5. In my first judgment in the matter (*Byron Shire Council v Vaughan*, NSWLEC, 14 July 1998, unreported) I made a declaration as follows:

> [T]*he house which has been erected on lot 5 of Section 3 in Deposited Plan 1623 has been erected also partly on lot 6 in Section 3 in Deposited Plan 1623.*

6. That declaration was left undisturbed by the subsequent orders of the Court of Appeal following the hearing of an appeal against my first judgment: see *Vaughan v Byron Shire Council* (1999) 103 LGERA 321 at 328.

7. In the light of the existing declaration and of my finding that the respondents have established the defence of estoppel it is appropriate that orders be now made to finally dispose of the proceedings. The parties disagree, however, on the appropriate orders to be made.

8. Mr J L B Allsop SC, who (with Ms L M Byrne) appears for the applicant, submits that notwithstanding the finding of estoppel, orders can be accommodated on its application under the Encroachment of Buildings Act to the extent necessary to satisfy the minimum equity to do justice between the parties. He relies upon the following statement in the Court of Appeal's decision:

> *Any estoppel favouring the Vaughans can, and should if possible, be accommodated in the order made on the council's application under the Encroachment of Buildings Act.*
>
> (per Fitzgerald JA at 332).

9. The applicant now seeks an order that the respondents cause to be permitted the removal of the house which stands partly upon lot 5 (the respondents' land) and partly upon lot 6 (the applicant's land) in deposited plan 1623 to such of lots 3, 4 and 5 as the respondents identify on condition that the applicant pay the costs thereof.

10. In support of the making of such an order under the Encroachment of Buildings Act, Mr Allsop made the following submissions. (1) The representation which was made and upon which the estoppel was based is that the house was constructed within lots 3-5. (2) The respondents had assumed that they were purchasing lots 3-5 with a house on it and the proposed order would give them that. (3) The detriment to the respondents caused by the acts of the applicant which gave rise to the estoppel would be met by relocating the house (at the applicant's cost). (4) The estoppel operates against the applicant to prevent it

from resiling from the representation which it made, insofar as any such resiling would be unjust. (5) The applicant accepts that it would be unjust if the detriment remains unremedied. (6) The order now proposed by the applicant would remedy the detriment to the respondents so that there would be no unjust departure from the assumption and representation. (7) By making good the assumption, the detriment to the respondents is avoided and it is the prevention of detriment which is the basis of estoppel at law or in equity (he referred to *Grundt v Great Boulder Propriety Goldmines Ltd* (1937) 59 CLR 641 at 674, per Dixon J). (8) If the application is simply dismissed it would leave the encroachment unremedied.

11. The respondents, on the other hand, seek a declaration reflecting the fact that there has been a finding that the defence of estoppel has been established. Such a declaration is necessary, it is submitted, because the Court of Appeal left undisturbed the declaration described in par [5] hereof and some declaration is needed to protect the respondents' position. Apart from that, the respondents ask merely for an order that the application be dismissed with costs.

12. Mr S D Rares SC (with Ms R Sofroniou), appearing for the respondents made the following submissions. (1) The plan upon which the estoppel is founded purports to define the land which the respondents believed they were purchasing. (2) That plan wrongly identifies the north-eastern boundary of lot 5 as being that of lot 6 or in the approximate vicinity of the north-eastern boundary of lot 6. (3) When the respondents purchased the house they thought that lots 3-5 were where lots 4-6 are. (4) The respondents thought they were buying a house on the land on which it stood. (5) As noted in my previous judgment, Mr Vaughan said if he had believed otherwise he would have deferred settlement of the purchase until the matter was resolved. (6) The relief that should be granted should be in such terms that the respondents can again raise an estoppel against any further action which the applicant might bring in relation to the land depicted in the plan which contains the representation.

13. In considering the submissions I am mindful that in *Grundt* Dixon J referred to the purpose of the doctrine of estoppel by representation in the following terms (at 674):

> *The purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite the party to adhere to the assumption upon which the former acted or abstained from acting.*

14. In my opinion the Court should make a declaration to reflect the fact that the defence of estoppel has been established. Such a declaration is necessary to qualify the declaration which was left undisturbed by the Court of Appeal. The Court should do so pursuant to section 22 of the Land and Environment Court Act 1979, which directs the court to grant all remedies to which any of the parties appears to be entitled in respect of any legal or equitable claim properly brought forward by that party in the matter, so that as far as possible all matters in controversy between the parties may be completely and finally determined.

15. I am also of the opinion that the order sought by the applicant should not be made because, as Mr Rares pointed out, the respondents thought they were buying a house on the land on which the house stood, which was not lots 3-5 as they thought, but was in fact the land being lots 4-6 or thereabouts. The order sought by the council would seem to amount to an unjust departure from that assumption.

Costs

16. The Court of Appeal made an order that the costs of the first trial abide the order of the judge presiding at the new trial. Following the conclusion of the first trial I reserved the question of costs.

17. Mr Allsop has drawn my attention to the judgment of Sheahan J in *McKinnon v Hallbridge Pty Ltd* (NSWLEC, 10 July 1998, unreported). That was a claim for relief under the Encroachment of Buildings Act. Sheahan J said (at p. 2):

> *As these are Class 3 proceedings, they are governed by the Court's Practice Direction 10A, which provides that the Court will generally not make costs order unless the circumstances are "exceptional".*
>
> Sheahan J held that the circumstances of that case were exceptional and his Honour deemed it just in the circumstances to make an order for costs.

18. Mr Allsop submits alternatively that there should be an apportionment of costs because the applicant was successful on a number of discrete issues on the first trial.

19. Clause 10A of the Court's Practice Direction 1993 does not apply, however, to applications under the Encroachment of Buildings Act. It states:

The practice of the Court is that no order for costs is made in valuation appeals, farmland rating appeals (or other rating appeals), and subdivision appeals in class 3 of the Court's jurisdiction, unless the circumstances are exceptional.

20. In *Droga v Proprietors of Strata Plan 51722* (NSWLEC, 28 November 1997, unreported) Bignold J applied section 14 of the Encroachment of Buildings Act and section 69 of the Land and Environment Court Act 1979 ("the Court Act") in holding that the usual principles relating to costs should apply to applications made under the Encroachment of Buildings Act. In *Hofer v Howell Developments Pty Ltd [2]* [2001] NSWLEC 42 I followed Bignold J's judgment and held that the general principles relating to costs should apply to an application under the Encroachment of Buildings Act. Section 69 of the Court Act provides that costs are in discretion of the Court. Section 14 of the Encroachment of Buildings Act provides as follows:

In any application under this Act the Court may make such order as to payment of costs charges and expenses as it may deem just in the circumstances and may take into consideration any offer of settlement made by either party.

21. In exercising the Court's discretion as to costs the Court must be guided by the general principle explained by the High Court in *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 at 477:

It is a general rule that a wholly successful defendant should receive his costs unless good reason is shown to the contrary.

(Followed by Gaudron and Gummow JJ in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 86.)

It would normally follow that the unsuccessful applicant should pay the successful respondents' costs in this case.

22. On the question of whether the issues can be separated so as to attract an apportionment of costs Mr Rares relies upon the decision of the Full Court of the Federal Court in *Australian Trade Commission v Disktravel* [2000] FCA 62, 11 February 2000, unreported. In that case the Full Court (French, Kiefel and Mansfield JJ) cautioned against too ready a resort to apportionment according to issue-based outcomes (at par [3]). The court adopted the observations of Jacobs J in *Cretazzo v Lombardi* (1975) 13 SASR 4 at 15:

The ultimate ends of justice may not be served if a party is dissuaded by the risk of costs from canvassing all issues, however doubtful, which might be material to the decision of the case. There are, of course, many factors affecting the exercise of the discretion as to costs in each case, including, in particular, the severability of the issues, and no two cases are alike. I wish merely to lend no encouragement to any suggestion that a party against whom the judgment goes ought nevertheless to anticipate a favourable exercise of the judicial discretion as to costs in respect of issues upon which he may have succeeded, based merely upon his success in those particular issues.

23. The present case is not one which merits an apportionment of costs. The respondents were brought to the Court at the suit of the applicant. They had to defend the applicant's claim and were ultimately successful. The issues the respondents raised in defending the claim were not unreasonably raised. If the respondents had not been brought to court then it would not have been necessary for them to raise any of those issues. Moreover, none of the issues were so distinct and severable in terms of time and work involved as to warrant an apportionment.

Orders

24. It is appropriate that I make the following orders:

(1) Without prejudice to the respondents' right to assert any other or wider estoppel against the applicant in respect to any other issues relating to lot 6 in deposited plan 1623, I make a declaration that the applicant is estopped from asserting any claim pursuant to the Encroachment of Buildings Act 1922 against the respondents in respect of any encroachment by the respondents' house onto the applicant's property being lot 6 of section 3 in deposited plan 1623.

(2) Order that the application be otherwise dismissed.

(3) By consent I vacate the order for costs made by consent on 9 November 1998 following the first trial.

(4) Order that the applicant pay the costs of the proceedings, including the costs of the first trial heard on 22 and 23 June 1998.

(5) The exhibits may be returned.